CONSTITUTIONAL LAW (LAW 508) §§ A-E

FINAL EXAMINATION

PROF. DAVID B. CRUZ

May 4, 2015
10:00 a.m.

Part II (Essay)

Time: 2½ (i.e., two and one-half) hours
75% of exam grade (20-35% for Question 1, 40-55% for Question 2)
OPEN BOOK

INSTRUCTIONS FOR PART II

Part II of the exam consists of two (i.e., 2) essay questions. You are to answer both questions. Recommended times (I’m kind of guessing) are as follows: 20 minutes to read both questions and start outlining (approximately 10:00 to 10:20 a.m.); 30 minutes (approximately 10:20 to 10:50 a.m.) to finish outlining for and answer Question 1; 1 hour 20 minutes (approximately 10:50 a.m. to 12:10 p.m.) to finish outlining for and answer Question 2. This would leave 20 minutes (approximately 12:10 to 12:30 p.m.) for you to use as you see fit.

Be sure to complete the specific task assigned. (Be normative!) If you believe that your answer depends on any facts or legal information not provided in the question, specify the facts or legal matters clearly and explain how they would affect your answers.

Part II is an open book, open notes examination. You may bring into the examination room and consult during Part II of the examination any written/printed matter you wish. You will not be credited for citing cases not included in the assignments or discussed in class or on Blackboard.

For those using bluebooks, write your answers to Question 1 and Question 2 in separate bluebooks. (You may use more than one bluebook per question; label each bluebook with its sequence in your answer and the number of the question, e.g., “Question 1, 2 of 3 books” and “Question 2, 1 of 2 books.”) WRITE OR PRINT—LEGIBLY—ON ONLY ONE SIDE OF EACH PAGE AND EVERY OTHER LINE. If your writing/printing is difficult to read, write on every third line. I prefer you not emphasize words/phrases with bold, underlining, etc., though if it helps you answer the question you may do so.

YOU MUST STOP WRITING OR TYPING WHEN INSTRUCTED TO DO SO BY THE PROCTOR. FAILURE TO DO SO WILL BE CONSIDERED A BREACH OF ACADEMIC DUTY AND WILL BE REPORTED TO THE DEAN’S OFFICE BY THE PROCTOR.

DO NOT LIFT THIS COVER SHEET UNTIL INSTRUCTED TO DO SO BY THE PROCTOR.
QUESTION 1:

In *McCulloch v. Maryland* (1819), in upholding the power of Congress to create the Bank of the United States, the Supreme Court opined

that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.

In other cases as well the Court has treated past governmental practices as relevant to interpretation of the Constitution. Drawing on material from the course (assignments, class discussion (oral and/or Discussion Board), and/or Blackboard materials/email messages), write an essay evaluating the quotation above and assessing the Supreme Court’s use of past governmental action in interpreting constitutional powers and/or rights.

QUESTION 2:


In summer 2014, the city council of Fayetteville in the state of Arkansas considered the Human Dignity Resolution (HDR), a broad antidiscrimination bill. Shortly before the council voted on the ordinance in August, reality star Michelle Duggar of “19 Kids and Counting” narrated a robocall sent to Fayetteville residents that echoed the claims of several local pastors who said that the ordinance would be “opening a door” for pedophiles and sexual predators who wish to abuse people by claiming that was their “sexual orientation.” Following nearly 10 hours of public discussion or debate where 73 residents who spoke favored the measure two-to-one and about 20 LGBT persons recounted discrimination against them, the council passed the ordinance. “I don’t think until we had this conversation that most people realized that it was legal in Fayetteville to fire somebody or evict somebody just for being gay,” the councilmember who sponsored the ordinance said. “I think it’s important to close that loophole.” The measure forbade discrimination in employment, housing, and public accommodations, on the grounds of race, ethnicity, national origin, adult age, gender, gender identity, gender expression, familial status, marital status, socioeconomic background, religion, sexual orientation, disability, or veteran status.

The mayor vetoed the HDR, but the council overturned his veto. A group opposed to the law then qualified it for a referendum pursuant to the established rules under the city charter. In December
2014 the city voters repealed the antidiscrimination ordinance by vote of 52% to 48% (7,523 votes to 7,040). (In 1998 Fayetteville voters (58% to 42%) had repealed an antidiscrimination ordinance the council adopted that would have prohibited the city government from discriminating on the basis of sexual orientation in hiring or firing city employees.)

When Fayetteville politicians suggested reintroducing the law, Republican state Sen. Bart Hester, who supported the repeal campaign, introduced a bill in the state house to block Fayetteville and other jurisdictions from attempting to pass similar laws. The statutorily specified purpose of Hester’s “Intrastate Commerce Improvement Act,” now known as Act 137 (after it became law in February of 2015), was “to improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations, regardless of the counties, municipalities, or other political subdivisions in which the businesses, organizations, and employers are located or engage in business or commercial activity.”

Act 137’s key section provided that “[a] county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law.” (It exempted “a rule or policy that pertains only to the employees of a county, municipality, or other political subdivision.”) Because Arkansas state laws ban discrimination on the basis of race, religion, national origin, sex, and disability but do not forbid sexual orientation or gender identity discrimination, Act 137 precludes any localities from banning sexual orientation or gender identity discrimination or enforcing such bans. Tennessee enacted a law similar to Act 137 in December 2014, voiding a Nashville ordinance against sexual orientation discrimination. Texas state lawmakers are considering similar proposals in the wake of Houston, Fort Worth, Austin, and San Antonio’s adopting sexual orientation antidiscrimination laws.

Hester said he sponsored the bill to create uniform policies that will attract business, and found it “infuriating” that officials in Fayetteville had repeatedly attempted to expand civil rights laws to protect LGBT people. Hester acknowledged LGBT people can be targeted for discrimination, but contended that “we are all singled out for discrimination. I am singled out as a politician. I am singled out because I am married to one woman,” he said. “I want everyone in the LGBT community to have the same rights I do. I do not want them to have special rights that I do not have.”

Opponents of the law dismissed the statutory claim about legal consistency, pointing out that taxes, zoning, and a bevy of other local laws vary from city to city and that Act 137 does nothing to stop cities from adopting varyingly stringent protections against discrimination on grounds that are included in state laws.

When she read about the Fayetteville referendum repealing the city’s HDR and about Act 137, they struck first-year U.S. Senator Bonnie Bennett (a Democrat from Mystic Falls, Virginia) as violative of the equal protection rights of lesbian, gay, and bisexual persons. In particular, Act 137 reminded her of Colorado’s law invalidated in Romer v. Evans, which she vaguely remembered from when she was a law student years ago. Act 137 also seemed to her like a violation of the political process or political restructuring doctrine, which she read about last year when the Supreme Court addressed Michigan’s ban on affirmative action in Schuette v. Coalition to Defend Affirmative Action; thanks to Act 137, Arkansas now requires people to seek protection against sexual orientation
discrimination not from city councils but from the Arkansas state legislature. Concerned about what she saw as an emergent trend of state laws denying legal protections to LGBT people (including state “religious freedom restoration acts”), Senat. Bennett is writing what she is terming the Let Freedom Ring Act (LFRA). In its current form, LFRA provides:

If a state allows local governments to enact any anti-discrimination laws, it may not forbid local governments from including sexual orientation or gender identity in those local antidiscrimination laws. In such states, whether or not ‘sexual orientation’ or ‘gender identity’ is expressly mentioned in any state law precluding local governments from adopting such protections, such state laws are void and without legal effect.

LFRA does not allow suits for money damages but merely purports to preempt noncompliant state laws.

Senator Bennett’s basic idea was that LFRA might be within Congress’s power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. But the Senator takes her oath of office seriously and does not wish to propose any federal legislation that would be unconstitutional. Fortunately, she has hired you as a summer intern after receiving a glowing recommendation from your constitutional law professor.

Write a memo to Sen. Bennett advising her on whether the current version of LFRA is, or is not, within Congress’s Section 5 power as a law to enforce the equal protection rights of lesbian, gay, and bisexual persons. You are to take a definitive position (“Senator, you should conclude the bill is constitutional” or “Senator, you should it is not constitutional”), provide arguments in support of your position, and as time allows articulate and engage reasonable counter-arguments. [Note to students out of role: Do not consider the fundamental rights or interests branch of equal protection law; limit your analysis to political process and/or classifications doctrine. To the extent possible, your analysis should be based on the facts as they appear in this problem. If you cannot resolve it based on these facts, then specify what else you would need to know and how the analysis would proceed depending on what you learn about that/those unknown fact/s. -DBC]